No. 17-3035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

JEREMY KETTLER,

Defendant-Appellant.

STATE OF KANSAS,
ex rel. DEREK SCHMIDT, in his official capacity
as Attorney General of the State of Kansas,

Intervenor.

On Appeal from the United States District Court
For the District of Kansas (No. 15-CR-10150-JTM-02)
Honorable J. Thomas Marten, Chief United States District Judge

BRIEF OF INTERVENOR STATE OF KANSAS

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July 21, 2017

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

United States v. Cox, No. 17-3034 (10th Cir.), currently pending, is a related appeal. Opening briefs in *Cox* are due August 21, 2017. The defendant-appellants in the two cases, Jeremy Kettler and Shane Cox, were co-defendants and tried together in the District Court. *See United States v. Kettler*, No. 15-10150-02-JTM (D. Kan.); *United States v. Cox*, No. 15-10150-01-JTM (D. Kan.).

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Kansas had jurisdiction of this federal criminal prosecution for violations of the National Firearms Act under 18 U.S.C. § 3231. *See* Aplt. App. 28.[1] The District Court entered final judgment disposing of all claims on February 6, 2017. *See* Aplt. App. 336. Kettler timely filed a notice of appeal on February 16, 2017. Aplt. App. 342. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Does the National Firearms Act, specifically 26 U.S.C. § 5861, preempt the Second Amendment Protection Act?

II. Did the District Court err in holding that the Second Amendment does not protect possession of silencers?

STATEMENT OF THE CASE

By enacting the Second Amendment Protection Act, K.S.A. 50-1201 *et seq.*, large bipartisan majorities of the Kansas Legislature affirmed recognized constitutional limits on Congress's authority to regulate firearms under its Article I powers, as well as the limitations

[1] The State cites Appellant's Appendix, filed by Kettler, as Aplt. App. [page number].

imposed by the Second, Ninth, and Tenth Amendments. The Act declares that the Second Amendment to the U.S. Constitution provides an individual right to keep and bear arms, K.S.A. 50-1202(c), and that any federal government "act, law, treaty, order, rule or regulation" that violates the Second Amendment "is null, void and unenforceable in the state of Kansas," K.S.A. 50-1206(a). *See District of Columbia v. Heller*, 554 U.S. 570, 592, 625 (2008).

The Act also declares that the Tenth Amendment reserves to the States all powers not granted to the federal government. K.S.A. 50-1202(a); *see also New York v. United States*, 505 U.S. 144, 156 (1992) (same). And Section 1204(a) specifies that a "personal firearm, a firearm accessory or ammunition" that has not traveled in interstate commerce "is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce." *Cf. United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (reluctantly concluding that *Scarborough v. United States*, 431 U.S. 563 (1977) suggests Congress may regulate a firearm if it ever crossed a state line).

Although the relevant provisions of the Second Amendment Protection Act were calibrated to conform to existing federal precedents, the federal government has long targeted the Act. The day after the Act took effect in April 2013, then-Attorney General Eric H. Holder wrote a letter to Kansas Governor Sam Brownback asserting that the Act is "unconstitutional." Letter (Apr. 26, 2014), *available at* http://media.kansas.com/smedia/2013/05/02/09/53/rFtDO.So.80.pdf.

In October 2015, the federal government indicted defendant-appellant Jeremy Kettler and his co-defendant Shane Cox on charges related to alleged violations of various provisions of the National Firearms Act, 26 U.S.C. § 5861. Aplt. App. 20. A superseding indictment charged Kettler with violating the National Firearms Act by unlawfully and knowingly possessing an unregistered silencer.[2] Aplt. App. 34-45. It also charged Kettler and Cox of conspiring to violate the National Firearms Act and charged Kettler with knowingly and willfully making a false statement to the Bureau of Alcohol, Tobacco, Firearms and Explosives. Aplt. App. 28-31.

[2] Devices that diminish the report of a firearm go by several different names, including silencer, muffler, and suppressor. In this brief the State uses the term silencer because that is the term used in the National Firearms Act. *See* 26 U.S.C. § 5845(a).

During the course of the investigation, the government found several people who, like Kettler, had obtained unregistered silencers from Cox's army surplus store, Tough Guys. Aplt. App. 371-72. One of them (a former law enforcement officer) even threw his silencer into a river to avoid being swept up in the investigation. Aplt. App. 372-73. Yet Kettler, who did not attempt to evade authorities and who cooperated with investigators, was charged. Aplt. App. 406.

From the very beginning when Kettler relied on the Second Amendment Protection Act in obtaining the silencer, Aplt. App. 425, through trial, the Second Amendment Protection Act has played a prominent role in this case. Kettler raised defenses based on the Act. *See, e.g.*, Aplt. App. 36-37 (Motion to Dismiss), 62 (Motion to Dismiss for Entrapment by Estoppel), 70 (Motion to Join All Motions of Co-Defendant Shane Cox), 198 (Motion to Dismiss), 275-76, 284 (Defendant's Response to Brief of State of Kansas), 288 (Motion to Join). And the United States has argued at every turn that the Act is "clearly preempted by federal law" and "invalid." Aplt. App. 86-87 (Gov't Resp. to Motions to Dismiss), 107 (Gov't Motion in Limine); *see also* Aplt. App.

116 (Gov't Reply to Kettler's Resp.), 307-08, 310, 319 (Gov't Resp. to Motion to Dismiss).

Kettler joined Cox's first motion to dismiss, which argued that the National Firearms Act does not preempt the Second Amendment Protection Act and exceeds Congress's Taxing and Commerce Powers. Aplt. App. 39, 48. The United States responded that the Second Amendment Protection Act is "clearly preempted by federal law" and "invalid." Aplt. App. 86-87. It also argued that the National Firearms Act is a valid exercise of Congress's Taxing and Commerce Powers. Aplt. App. 80-85. The District Court denied the motion without addressing the Second Amendment Protection Act by holding that the National Firearms Act is a valid exercise of Congress's Taxing Power, which the Second Amendment Protection Act does not address. Aplt. App. 94.

At a pretrial hearing on the parties' motions in limine, the District Court orally granted the United States' motion, finding that any defense based on the Second Amendment Protection Act is not valid. *See* Aplt. App. 177. Upon learning of the District Court's ruling, Kansas Attorney General Derek Schmidt moved to intervene as of right under

28 U.S.C. § 2403(b) to defend the constitutionality of the Act on behalf of the State of Kansas. Aplt. App. 166. The State argued that because the Second Amendment Protection Act is only concerned with federal statutes enacted as a purported exercise of Congress's Commerce power (K.S.A. 50-1204(a)), and the National Firearms Act is an exercise of Congress's Taxing Power, the constitutionality of the Second Amendment Protection Act should not be at issue in this case. But the State also acknowledged that the federal government had drawn into question the constitutionality of the Act by repeatedly going out of its way to ask the District Court to strike down the Act. The District Court granted the State's motion, clarifying that its ruling on the government's motion in limine was not a ruling on the constitutionality of the Second Amendment Protection Act. Aplt. App. 177.

During trial, Kettler and Cox jointly asked the District Court to dismiss the prosecution, arguing that the Second and Tenth Amendments bar the federal prosecution. Aplt. App. 275. For its part, the State defended the Second Amendment Protection Act, reiterating that the Act simply reaffirms existing constitutional limits on

Congress's authority to regulate firearms, including the limitations imposed by the Second Amendment. Aplt. App. 244.

At the close of the government's case-in-chief, Kettler moved for judgment of acquittal on all counts. *See* Aplt. App. 415, 417-20. The District Court granted the motion with respect to the false statement and conspiracy charge, but denied the motion with respect to the charge for possession of an unregistered silencer. Aplt. App. 423-24. Kettler was ultimately convicted of the possession charge. Aplt. App. 241.

Before sentencing, the District Court denied the defendants' request to dismiss the prosecution on Second and Tenth Amendment grounds. Aplt. App. 323. The District Court declined to interpret the Second Amendment Protection Act, but held that the National Firearms Act is a valid exercise of Congress's Taxing Power "regardless of what [the Act] says" because the Second Amendment does not apply to silencers. Aplt. App. 326, 331-33.

Kettler was sentenced to one year of probation on February 6, 2017, Aplt. App. 336, and he timely appealed, Aplt. App. 342.

SUMMARY OF ARGUMENT

The federal government has taken aim at the Second Amendment Protection Act from day one. The day after the law took effect, then-Attorney General Eric H. Holder asserted the Department of Justice's view that the Act is "unconstitutional." Letter, http://media.kansas.com/smedia/2013/05/02/09/53/rFtDO.So.80.pdf. And the United States has argued at every turn that the Act is "clearly preempted by federal law" and "invalid." *See, e.g.*, Aplt. App. 86-87.

The federal government also has targeted Kettler. At best, the federal government's decision to charge Kettler is a curious exercise of prosecutorial discretion. At worst, it reflects an attempt to use Kettler—an Army veteran who served in Iraq and Afghanistan—in the government's overzealous effort to challenge the Second Amendment Protection Act.

1. The Second Amendment Protection Act is not preempted by the National Firearms Act. The Second Amendment Protection Act codifies in state law the federal constitutional limits on congressional power found in the Commerce Clause and the Second, Ninth, and Tenth Amendments. The Act regulates only what the federal government has

no power to regulate; if a federal law conflicts with the Act, it conflicts with the U.S. Constitution and is itself invalid. Here, however, there is no conflict between federal and state law. The Second Amendment Protection Act simply says that personal firearms, firearm accessories, or ammunition that are manufactured and owned in Kansas, and that remain in Kansas, are "not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, *under the authority of congress to regulate interstate commerce*." K.S.A. 50-1204(a). The federal law at issue here, the National Firearms Act, was not enacted under Congress's Commerce Power; it was enacted under Congress's Taxing Power. So the National Firearms Act does not even implicate K.S.A. 50-1204(a). This Court should reject any suggestion by the District Court or the United States that the National Firearms Act somehow preempts the Second Amendment Protection Act.

2. Because the Second Amendment Protection Act codifies Second Amendment protections, *see* K.S.A. 50-1206(a), the District Court's conclusion that the Second Amendment right to keep and bear arms does not protect the right to keep and bear silencers substantially limits

the scope of the Second Amendment, and in turn the Second Amendment Protection Act.

The District Court's substantial limitation of a fundamental right—the right to keep and bear arms—was entirely unnecessary, is inconsistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to keep and bear arms) and *McDonald v. Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment applies to the States), and is contrary to fact. The District Court's suggestion that silencers are "outside the scope of Second Amendment protection" because they are more dangerous and unusual than machine guns lacks any factual basis. To the contrary, silencers are not dangerous and unusual weapons; they are in common use for several important lawful purposes, including protecting against hearing damage or loss.

3. The District Court erred in holding that the Second Amendment categorically does not apply to silencers. If this Court agrees, it should remand the case to the District Court to determine whether the current application of the National Firearms Act provisions regarding silencers violate the Second Amendment.

ARGUMENT

I. The National Firearms Act Does Not Preempt the Second Amendment Protection Act.

The federal government has repeatedly argued that the Second Amendment Protection Act is "clearly preempted by federal law" and "invalid." Aplt. App. 86-87, 107; *see also* Aplt. App. 116, 307-08, 310, 319. But the Second Amendment Protection Act simply reaffirms the constitutional limits on Congress's authority to regulate firearms, firearms accessories and ammunition, protecting the rights reserved to Kansas and its citizens under the Second, Ninth, and Tenth Amendments. *See* K.S.A. 50-1202.

The Second Amendment Protection Act says,

> A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, *under the authority of congress to regulate interstate commerce*.

K.S.A. 50-1206(a) (emphasis added).

But the National Firearms Act, at issue here, was enacted under Congress's Taxing Power. *See Sonzinsky v. United States*, 300 U.S. 506, 511-12 (1937); *United States v. Dalton*, 960 F.2d 121, 124-25 (10th Cir.

1992). So it could not preempt the Second Amendment Protection Act, which focuses on the limitations on Congress's Commerce Power.

In any event, a state statute like the Second Amendment Protection Act that codifies in state law the federal constitutional limits on congressional authority—whether those limits are imposed by the Commerce Clause, Taxing Clause, Second Amendment, Tenth Amendment, or otherwise—does not violate the Supremacy Clause. A personal firearm or firearm accessory that is manufactured and owned in Kansas, that remains within the borders of Kansas, and is stamped "Made in Kansas," *see* K.S.A. 50-1204(a), 50-1205, does not fall within Congress's authority to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, or activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59, 567 (1995) (striking down the Gun-Free School Zones Act, which made it a federal crime to possess a firearm within 1,000 feet of a school, because it exceeded Congress's Commerce Power); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (rejecting Congress's attempt to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"

because "[t]he Constitution requires a distinction between what is truly national and what is truly local"); *see also Jones v. United States*, 529 U.S. 848, 853 (2000) (a federal statute prohibiting arson of "real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" does not cover arson of an owner-occupied dwelling used for everyday family living in light of the limitations on Congress's Commerce Power); *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824) (the Commerce Clause does not "comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States").

Accordingly, both the Supreme Court and this Court have been reluctant to interpret federal gun control laws enacted pursuant to the Commerce Clause (such as the 1968 Gun Control Act) to apply to firearms that have never crossed a state line. *See, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 566-67 (1977); *United States v. Bass*, 404 U.S. 336, 349-50 (1971). Any broader interpretation of federal law would unconstitutionally encroach on an area of traditional state concern to regulate conduct that has no commercial character. *See, e.g.*,

Lopez, 514 U.S. at 560-62 & n.3. *But see United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995) (rejecting a Commerce Clause challenge to a federal law prohibiting the transfer or possession of machineguns, which are not covered by the Second Amendment Protection Act, K.S.A. 50-1209(c)).

For example, in *United States v. Bass*, 404 U.S. 336 (1971), the Supreme Court held that "[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction." 404 U.S. at 349-50. And in *Scarborough v. United States*, 431 U.S. 563 (1977), the Supreme Court held that Congress could regulate firearms that at some time had traveled in interstate commerce. 431 U.S. at 566-67. This Court rightly has called into question the continuing validity of *Scarborough* given the "considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases." *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006). But the Second Amendment Protection Act does not attempt to predict what the Supreme Court might do if it were to reconsider *Scarborough*. The Act adopts the rule of *Scarborough*, nothing more.

The Second Amendment Protection Act is not preempted by the National Firearms Act.

II. The Second Amendment Protects Possession of Silencers.

The Second Amendment Protection Act is based on an indisputable premise: "Any act, law, treaty, order, rule or regulation of the government of the United States which violates the second amendment to the constitution of the United States is null, void and unenforceable in the state of Kansas." K.S.A. 50-1206(a). Any law—state or federal—that violates the Second Amendment is void. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). A state law reinforcing this fundamental principle may be redundant, but it is not repugnant to federal law.

The Second Amendment "right of the people to keep and bear Arms" is a fundamental one. U.S. Const. amend II; *McDonald v. Chicago*, 561 U.S. 742, 767-78 (2010). It protects an individual right to keep and bear arms that are in common use for traditionally lawful purposes. *District of Columbia v. Heller*, 554 U.S. 570, 624, 627, 635 (2008). By holding that the Second Amendment does not apply to possession of silencers, the District Court "dilute[d] prematurely what

many consider to be one of the most important amendments to the United States Constitution." *See United States v. Parker*, 362 F.3d 1279, 1288 (10th Cir. 2004) (declining to decide the scope of the Second Amendment, instead deciding the case on the "narrow basis" that "reasonable restrictions on the Second Amendment right are constitutional").

The government first argued that the Second Amendment does not apply to silencers in a footnote to its response to the defendants' mid-trial motion to dismiss. Gov't Response to Cox Motion to Dismiss, Aplt. App. 316-17 n.8. The District Court adopted the government's argument, Aplt. App. 332, and the issue now is properly before this Court.

The Second Amendment protects an individual right to possess weapons "typically possessed by law-abiding citizens for lawful purposes," including "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 625; *accord Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016). The only recognized limitation of the Second

Amendment is that it does not protect the "carrying of dangerous and unusual weapons." *Heller*, 554 U.S. at 627.

To begin with, silencers are "instruments that constitute bearable arms." *Heller*, 554 U.S. at 625. The National Firearms Act includes silencers in the definition of "firearm." 26 U.S.C. § 5845(a). And in *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court recognized that the "Arms" the people had the right to keep and bear were not strictly limited to firearms but included "ordinary military equipment" such as ammunition, bayonets and iron ramrods fitted on the firearm's barrel, and other "proper accoutrements." 307 U.S. at 180-82. Although modern silencers of the sort at issue here were invented long after the Second Amendment was ratified, the Amendment "'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" *Caetano*, 136 S. Ct. at 1028 (quoting *Heller*, 554 U.S. at 582). At the very least, silencers are a modern-day analog to the various firearm accoutrements the Second Amendment protects. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*") (holding that the Second Amendment covers large-capacity magazines—those capable of holding more than 10 rounds).

Relying on a misconception of how and why silencers are actually used, the District Court held that the Second Amendment does not cover silencers because "no showing [was] made that [silencers] are a type of arm 'in common use.'" Aplt. App. 332. Having decided that silencers are "outside the scope of Second Amendment protection," the District Court held that the "application of the [National Firearms Act] to persons possessing, transferring or making such items does not infringe on Second Amendment rights." Aplt. App. 332-33.

In support, the District Court relied on three unpublished decisions, one from the Ninth Circuit and two from out-of-circuit district courts. None of these cases is persuasive. In *United Sates v. McCartney*, 357 F. App'x 73 (9th Cir. 2009) (unpublished), without discussion or citation to any authority the Ninth Circuit lumped silencers together with grenades and directional mines, stating that silencers are "even more dangerous and unusual than machine guns." 357 F. App'x at 76. The district court cases similarly equate machine guns and silencers without any basis for doing so. *United States v. Perkins*, No. 08CR3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008) (unpublished); *United*

States v. Garnett, No. 05-CR-20002-3, 2008 WL 2796098, at *4 (E.D. Mich. July 18, 2008) (unpublished).

The District Court's decision gives short shrift to the fundamental right the Second Amendment protects. And it fails to meaningfully apply the *Heller* test, which requires determining whether silencers are in common use for traditionally lawful purposes, or are "dangerous and unusual weapons." 554 U.S. at 627; *see also, e.g.*, *Heller II*, 670 F.3d at 1261.

A. Silencers are in common, lawful use.

To begin with, more than 900,000 silencers were registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives as of February 2016. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Commerce in the United States: Annual Statistical Update 2016* 15, *available at* https://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download. And that is despite legal impediments to owning a silencer, including the National Firearms Act requirements—paying a $200 transfer tax, submitting a detailed application and fingerprints, and a months-long wait for the federal government to process the application. *See* 26 U.S.C. § 5811;

U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Enforcement Programs & Services Processing Times*, https://www.atf.gov/about/docs/undefined/current-processing-times-atf-applications/download ("BATFE Processing Times").

In addition to the sheer number of lawfully registered silencers, silencers serve several lawful and beneficial purposes. One of the government's own experts, Special Agent Neal Tierney of the Bureau of Alcohol, Tobacco, Firearms and Explosives, testified that he has two registered silencers and that the "primary purpose" of a silencer is to reduce the sound of a firearm so it does not damage the user's hearing. Aplt. App. 382-83.

The American Speech-Language Hearing Association warns that "[e]xposure to noise greater than 140 dB can permanently damage hearing," and that "[a]lmost all firearms create noise that is over the 140-dB level." Michael Stewart, *Recreational Firearm Noise Exposure*, http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/. As a result, people "can suffer a severe hearing loss with as little as one shot, if the conditions are right." *Id.* Other experts agree. Jay M. Bhatt, et al., *Epidemiology of Firearm and Other Noise*

Exposures in the United States, The Laryngoscope at 5 (forthcoming 2017), *available at* http://onlinelibrary.wiley.com/doi/10.1002/lary.26540/epdf.

Hearing loss from even limited firearm use is a regular occurrence, "especially during hunting season when hunters and bystanders may be exposed to rapid fire from big-bore rifles, shotguns, or pistols." Stewart, Recreational Firearm Noise Exposure. Even a ".22-caliber rifle can produce noise around 140 dB, while big-bore rifles and pistols can produce sound over 175 dB." *Id.* And firing guns at an indoor firing range, "where sounds can reverberate, or bounce off walls and other structures, can make noises louder and increase the risk of hearing loss." *Id.*

One of the silencers produced by Cox and tested by Elizabeth Gillis, a Firearms Enforcement Officer with the Bureau of Alcohol, Tobacco, Firearms and Explosives, reduced the report of the firearm by 23.13 decibels, which is a substantial amount. Aplt. App. 391-92. While earplugs are another option for mitigating the noise from a firearm, Cox testified that earplugs are uncomfortable and detract from the sport shooting experience. Aplt. App. 411-12. This explains why more than

20% of firearms users never use hearing protection. Bhatt, *Epidemiology of Firearm and Other Noise Exposures*. And "[h]unters are even less likely to wear hearing protection because they say they cannot hear approaching game or other noises." Stewart, *Recreational Firearm Noise Exposure*.

As the inventor of the modern-day silencer put it, the silencer "was developed to meet my personal desire to enjoy target practice without creating a disturbance. I have always loved to shoot, but I never thoroughly enjoyed it when I knew that the noise was annoying other people." Hiram Percy Maxim, Experiences with the Maxim Silencer, *available at* http://www.silencerresearch.com/maximletters.pdf.

B. Silencers are not dangerous or unusual.

The District Court seems to have relied without basis on a common misperception that silencers primarily are used to conceal the use of firearms in criminal activity. This view of silencers is wrong for the reasons explained above, and for two additional important reasons.

First, silencers do not completely silence firearms or enable criminals using firearms to go undetected when they would otherwise

be heard. *See* Nathan Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?*, http://www.npr.org/2017/03/21/520953793/debate-over-silencers-hearing-protection-or-public-safety-threat (comparing the sound of four different firearms with and without a silencer); *see also*, David Kopel, *The Hearing Protection Act and 'silencers'*, Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/the-hearing-protection-act-and-silencers/?utm_term=.89de3e7f966f.

Second, the government has not produced and the District Court did not cite any basis for believing that silencers lead to increased firearm-related crime or cause firearm-related crimes to go unsolved. Nor is the inclusion of silencers in the National Firearms Act a sign that Congress viewed silencers as particularly dangerous or unusual. After all, the Supreme Court has said that the National Firearms Act is a tax law with "no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose." *Sonzinsky*, 300 U.S. at 513.

Because silencers are arms in common use for lawful purposes and are neither dangerous nor unusual, the Second Amendment

protects them. The District Court's decision curtailing the fundamental constitutional right to keep and bear arms, on threadbare analysis, should be reversed.

III. Whether the Federal Government's Current Implementation of the National Firearms Act's Silencer Provisions Violates the Second Amendment Should be Determined by the District Court on Remand.

Whether the federal government's current implementation of the National Firearms Act's silencer provisions violates the Second Amendment is a question for the District Court on remand in the first instance.

The Supreme Court has held that the National Firearms Act is a proper exercise of Congress's Taxing Power. *Sonzinsky*, 300 U.S. at 511-12; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544-45 (2012). It also has suggested that on its face the Act does not violate the Second Amendment. *See Heller*, 554 U.S. at 626-27. But it remains an open question whether the Act—as the federal government is now implementing it—violates the Second Amendment.

In addition to the $200 transfer tax (which has been the same since 1934), the Act requires registering silencers before they can be lawfully possessed. Registration requires filling out numerous forms; a

form for permission to manufacture (Form 1), and a form for permission to transfer (Form 4), which according to Special Agent Tierney requires filling out 10 different forms. Aplt. App. 380. After filling out all the forms, there is a *nine-month wait* for ATF Form 4 (Application for Tax paid Transfer and Registration). BATFE Processing Times, https://www.atf.gov/about/docs/undefined/current-processing-times-atf-applications/download. At some point, the burdensome process and slothful federal bureaucracy that as a practical matter prohibits possession of certain firearms, including silencers, for nearly a year after purchase will violate the Second Amendment. The question is whether that time has already come.

Because the District Court held that the Second Amendment did not apply to silencers it did not reach the secondary question of whether the National Firearms Act, as applied, is a permissible limitation on the right to keep and bear arms under the Second Amendment. This Court should remand the case to allow the District Court to address this important question.

CONCLUSION

The State respectfully requests that the Court reject the government's argument that the National Firearms Act preempts the Second Amendment Protection Act and reverse the District Court's decision that the Second Amendment does not protect the possession of silencers.

STATEMENT REGARDING ORAL ARGUMENT

In the State's motion to participate as a party it sought leave to participate in this appeal in the same way it participated in the District Court. The District Court allowed the State's intervention for the purpose of defending Kansas law but permitted the State only to file briefs defending the Second Amendment Protection Act. *See* Aplt. App. 177. Therefore, consistent with its participation in the District Court and its motion to participate in this appeal, the State has no objection to oral argument by the parties but does not request to participate in oral argument itself and instead requests to stand on its briefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4,703 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 2007.

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CERTIFICATE OF DIGITAL SUBMISSION, VIRUS SCAN, AND PRIVACY REDACTIONS

I certify that a copy of the foregoing Brief of Intervenor State of Kansas, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Sophos Endpoint Security and Control (version 10.7), last updated July 21, 2017. According to the program, the document is free of viruses. No privacy redactions were necessary in this document.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2017, I electronically filed the foregoing Brief of Intervenor State of Kansas with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven hard copies to be delivered to the Clerk's Office by Federal Express within two business days of this filing.

Dated: July 21, 2017 s/ Derek Schmidt

ATTACHMENTS

Page

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Jeremy Kettler

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:15CR10150 - 002
USM Number: 25637-031
Defendant's Attorney: Ian M. Clark

THE DEFENDANT:

☐ pleaded guilty to count(s): ___.
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☒ was found guilty on count 13 of the First Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
26 U.S.C. § 5861(d)	POSSESSION OF UNREGISTERED FIREARM, a Class C Felony	07/14/2014	13

The defendant is sentenced as provided in pages 1 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___.

☒ Counts 1 and 5 of the Indictment are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

02/06/2017
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J. Thomas Marten, Chief U.S. District Judge
Name & Title of Judge

February 6, 2017
Date

Attachment 1

DEFENDANT: Jeremy Kettler
CASE NUMBER: 6:15CR10150 - 002

PROBATION

You are hereby sentenced to probation for a term of 1 year .

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended based on the court's determination that you pose a low risk of future substance abuse. *(Check if applicable.)*

4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check if applicable.)*
6. ☐ You must participate in an approved program for domestic violence. *(Check if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(Check if applicable.)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Jeremy Kettler
CASE NUMBER: 6:15CR10150 - 002

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Jeremy Kettler
CASE NUMBER: 6:15CR10150 - 002

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, house, residence, vehicle(s), papers, business or place of employment and any property under your control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. You must warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: Jeremy Kettler
CASE NUMBER: 6:15CR10150 - 002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
Totals:	$100	Not applicable	None	None

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $___.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jeremy Kettler
CASE NUMBER: 6:15CR10150 - 002

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

A ☐ Lump sum payment of $___ due immediately, balance due
☐ not later than ___, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years, to commence ___ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 204, 401 N. Market, Wichita, Kansas 67202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 15-10150-01,02-JTM

SHANE COX and
JEREMY KETTLER,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendant Shane Cox's motion to dismiss (Dkt. 63). Defendant Jeremy Kettler joins in the motion. The motion argues that the National Firearms Act (NFA) is unconstitutional because it amounts to "regulatory punishment" rather than imposition and enforcement of a valid federal tax. Defendants further argue that the NFA violates the Second and Tenth Amendments to the U.S. Constitution. Dkts. 63, 78.

This case has generated significant interest within the District of Kansas and beyond. Many concerned persons have written emails or called the court's chambers to express their views. Judges are not allowed to publicly comment on pending cases, but I believe it is important to give a clear explanation of the court's decision and the reasons behind it to all who are interested. In order to do that, I begin with a summary of the court's obligations, the relevant law, and how the law applies to the facts of the case.

Before assuming office, every justice or judge of the United States courts must take the following oath:

> I [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a judge] under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453.

This oath requires a judge to uphold the Constitution and laws of the United States, as interpreted by the United States Supreme Court and the Tenth Circuit Court of Appeals. Where there is a decision on any point of law from the Supreme Court or the Tenth Circuit, or both, I am bound to follow those decisions. This is true whether the decision is absolutely identical, or whether it sets out a principle of law that applies equally to different facts. As a district court judge, I am not empowered to do what I think is most fair – I am bound to follow the law.

The U.S. Constitution provides in part that the Constitution and laws of the United States "shall be the supreme Law of the Land," binding all judges in every state, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In other words, United States District Courts are bound by federal law, even if a state law says something to the contrary.

The National Firearms Act (26 U.S.C. § 5861 et seq.) is a federal law that imposes a tax and licensing requirement on firearms dealers. It includes silencers among the items subject to registration and taxation. Eighty years ago, the Supreme Court upheld the NFA as a valid exercise of Congressional taxing power. *Sonzinsky v. United States*,

300 U.S. 506 (1937). The Supreme Court reaffirmed this point in *Nat'l. Fed'n of Indep. Bus. Women v. Sebelius*, 132 S.Ct. 2566 (2012). Further, the Supreme Court has held that if Congress has exercised a valid power, such as its taxing power, then the Tenth Amendment "expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992).

This leaves the Second Amendment. The Supreme Court, while recently recognizing that individuals have a right to "keep and bear Arms," also said that the Second Amendment is not absolute, and that nothing in its decision should be interpreted "to cast doubt on … laws imposing conditions and qualifications on the commercial sale of arms." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2816-17. The National Firearms Act is such a law.

As is more fully set out below, the Constitution and Supreme Court decisions discussed in this opinion compel the result this court reaches in upholding the constitutionality of the National Firearms Act and in denying the defendants' motion to dismiss.

I. Supremacy Clause.

The Constitution of the United States provides in part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof …shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI. This necessarily makes the question presented by defendant's motion one of federal law. If the NFA is otherwise consistent with the U.S. Constitution and is a

valid exercise of Congress's power to tax spelled out in the Constitution, then it is "the supreme Law of the Land," notwithstanding "any Thing in the … Laws of any State to the Contrary."

The defendants argue that Kansas's adoption of the Second Amendment Protection Act (SAPA), K.S.A. § 50-1204, somehow rendered the National Firearms Act unconstitutional. Dkt. 63 at 6. This court has no authority to construe SAPA or to determine what it means; that is a task reserved to the Kansas courts. But the Constitution could not be clearer on one point: if the National Firearms Act is a valid exercise of Congressional taxing power, and if it does not infringe on rights granted in the U.S. Constitution, then it is the "supreme Law of the Land," regardless of what SAPA says.

II. Is the NFA a valid exercise of Congress's taxing authority?

The Constitution gives the Congress certain enumerated powers. Among those is the authority to impose and collect taxes, and to enact laws for carrying out the taxing regimen. *See* U.S. Const., art. I, § 8 (The Congress shall have Power to lay and collect Taxes,… to pay the Debts and provide for the common Defence and general welfare of the United States" [and] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

In 1937, the Supreme Court of the United States addressed "whether section 2 of the National Firearms Act …, which imposes a $200 annual license tax on dealers in firearms, is a constitutional exercise of the legislative power of Congress." *Sonzinsky v. United States*, 300 U.S. 506, 511 (1937). The case involved the criminal conviction of a

man charged with unlawfully carrying on a business as a dealer in firearms without having registered or paid the tax required by the NFA. The defendant argued "that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the state because [it is] not granted to the national government." *Id*. at 512. He argued that the cumulative effect of imposing taxes on the manufacturer, dealer, and buyer of a covered firearm was "prohibitive in effect and … disclose[s] unmistakably the legislative purpose to regulate rather than to tax." *Id.* at 512-13. The Supreme Court flatly rejected the argument, finding that because the NFA "is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power." *Id*. at 513.

Sonzinsky has never been reversed, vacated or modified by the Supreme Court. Only recently, in *Nat'l Fed'n Of Indep. Bus. Women v. Sebelius*, 132 S.Ct. 2566 (2012), where the Supreme Court upheld the Affordable Care Act's "individual mandate" as a valid exercise of Congress's taxing power, the Court cited *Sonzinsky* for the proposition that a tax is not invalid merely because it seeks to influence behavior, noting "we have upheld such obviously regulatory measures as taxes on selling … sawed-off shotguns," and observing that "[e]very tax is in some measure regulatory" because it "interposes an economic impediment to the activity…." *Nat'l Fed'n of Indep. Bus. Women*, 132 S.Ct. at 2596 (citing *Sonzinsky*, 300 U.S. at 506, 513)). Because *Sonzinsky* remains a valid Supreme Court decision, it is "the supreme Law of the Land" on this issue.

Defendant urges the court to find the NFA invalid based on the observation in *Nat'l Fed'n of Indep. Bus. Women* that "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.*, 132 S.Ct. at 2599-2600. That argument, however, is precisely the one rejected by the Supreme Court in *Sonzinsky*. Unless or until the Supreme Court decides otherwise, this court is bound by *Sonzinky's* conclusion that the NFA represents a valid exercise of Congress's constitutional power to levy taxes. *See also United States v. Houston*, 103 Fed.Appx. 346, 349–50 (10th Cir. 2004) ("Mr. Houston fails to establish 26 U.S.C. § 5861(d) and its parent act are beyond Congress's enumerated power to either regulate commerce through firearms registration requirements, or impose a tax thereon."); *United States v. Roots*, 124 F.3d 218 (Table), 1997 WL 465199 (10th Cir. 1997) ("*Lopez* does not undermine the constitutionality of § 5861(d) because that provision was promulgated pursuant to Congress's power to tax"). The same conclusion has been reached by every federal court of appeals to have addressed the issue since adoption of the NFA.[1]

[1] *See United States v. Village Center*, 452 F.3d 949, 950 (8th Cir. 2006) ("irrespective of whether § 5861(c) is a valid exercise of Congress's commerce clause authority … it is a valid exercise of Congress's taxing authority"); *United States v. Lim*, 444 F.3d 910, 914 (7th Cir. 2006) ("Section 5861(d), as applied to Lim's possession of the sawed-off shotgun, is a valid use of Congress's taxing power"); *United States v. Pellicano*, 135 F. Appx. 44, 2005 WL 1368077 (9th Cir. 2005) (valid exercise of taxing power); *United States v. Oliver*, 208 F.2d 211 Table), 2000 WL 263954 (4th Cir. 2000) (the weapon need not have traveled in interstate commerce because § 5861 "has been held to be a valid exercise of the power of Congress to tax"); *United States v. Gresham*, 118 F.3d 258, 261-62 (5th Cir. 1997) ("Gresham charges that Congress has used the taxing power as a pretext to prohibit the possession of certain disfavored weapons, without any rational relationship to the revenue-raising purposes of the Internal Revenue Code. … To the contrary, it is well-settled that § 5861(d) is constitutional because it is 'part of the web of regulation aiding enforcement of the transfer tax provision in § 5811.'"); *United States v. Dodge*, 61 F.3d 142, 145 (2nd Cir. 1995) (the registration requirement "bears a sufficient nexus to the overall taxing scheme of the NFA and, therefore, assists the government in collecting revenues.").

Defendant cites the Tenth Amendment and argues that the NFA is invalid because it has "invaded an area of law that has traditionally been reserved to the States." Dkt. 63 at 6. But if the NFA is otherwise consistent with the Constitution and constitutes a valid exercise of Congress's taxing power – as the Supreme Court said it did in *Sonzinsky* – then it does not run afoul of the Tenth Amendment. *See New York v. United States,* 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Again, the Supreme Court in *Sonzinsky* specifically rejected the defendant's claim that the NFA was invalid because it regulated on a matter that was reserved to the states. *Sonzinsky*, 300 U.S. at 512.

III. Is the NFA consistent with the Second Amendment?

Defendant's original motion to dismiss did not argue that the NFA violates the Second Amendment. *See* Dkt. 63. His response to the State of Kansas's brief, however, relies almost exclusively on the Second Amendment. Dkt. 78. Be that as it may, a review of case law shows that defendant's Second Amendment argument is also foreclosed by Supreme Court precedent.

The Second Amendment provides that "the right of the people to keep and bear Arms … shall not be infringed." U.S. Const. amend II. In striking down a District of Columbia statute that essentially prohibited the possession of useable handguns in the home, the Supreme Court held that the Second Amendment "confer[s] an individual

right to keep and bear arms." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783 (2008). This amendment protects the right of law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, such as self-defense. *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) ("in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right.") (citing *Heller*, emphasis in original).

"Like most rights, the right secured by the Second Amendment is not unlimited." *Id*. at 2816. *Heller* noted the amendment did not confer a right to keep and carry *any* weapon for *any purpose* whatsoever. For example, the Court observed that prohibitions on carrying concealed weapons had long been upheld under the Second Amendment and under similar state laws. *Id*. Without defining the precise scope of the right to keep and bear arms, the Supreme Court pointed out that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms*." *Id*. at 2816-17 (emphasis added).

In *United States v. Miller*, 307 U.S. 174 (1939), two defendants were criminally charged with violating the NFA by transporting a short-barreled shotgun in interstate commerce without paying the tax and obtaining the approval required by the NFA. A U.S. District Court dismissed the charge, finding that it violated the Second Amendment. But the Supreme Court reversed that ruling because "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id*.

at 178.[2] In *Heller*, the Supreme Court reviewed *Miller* and indicated that it remains good law, stating: "We therefore read *Miller* to say … that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope" of the Second Amendment right. *Heller*, 128 S.Ct. at 2815-16. So, as *Miller* holds, the Second Amendment protects the sorts of weapons "in common use" but does not extend to "the carrying of 'dangerous and unusual weapons.'" *Heller*, 128 S.Ct. at 2817.

Defendant Cox was convicted of three different types of NFA violations. The first (Count 3) was for possessing a short-barreled rifle without registering it and paying the tax required by the NFA. Such a weapon is clearly comparable to the short-barreled shotgun at issue in *Miller*. No suggestion or showing is made that short-barreled rifles have been in common use by law-abiding citizens for lawful purposes. The court must therefore conclude under *Miller* that they fall outside the scope of the Second Amendment. *See Heller*, 128 S.Ct. at 2814 ("*Miller* stands … for the proposition that the Second Amendment right … extends only to certain types of weapons."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) ("It is clear … that the [NFA's] object was to regulate certain weapons likely to be used for criminal purposes, just as

[2] At the time of the *Miller* decision, the firearms covered by the NFA included "a muffler or silencer for any firearm…." *See Miller*, 307 U.S. at 175, n.1 (quoting Act of June 26, 1934, c. 757, 48 Stat. 1236-1240, 26 U.S.C.A. § 1132 *et seq.*). The NFA at that time also provided that "[a]ny person who violates or fails to comply with any of the requirements of [this Act] shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court." *Id*. *Miller* also rejected an argument that the NFA was not a valid revenue measure, stating that "[c]onsidering *Sonzinsky v. United States*, [supra, and other cases] the objection that the Act usurps police power reserved to the States is plainly untenable." 307 U.S. at 177-78.

the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used"); *United States v. Gonzales*, 2011 WL 5288727 (D. Utah Nov. 2, 2011) (short-barreled rifle was not a constitutionally protected arm under *Heller*); *United States v. Barbeau*, 2016 WL 1046093, *4 (W.D. Wash. Mar. 16, 2016) (defendant's possession of a short-barreled rifle was not protected by the Second Amendment); *United States v. Gilbert*, 286 F.App'x 383, 386, 2008 WL 2740453 (9th Cir. 2008) ("Under *Heller*, individuals still do not have a right to possess [machine guns] or short-barreled rifles").

The second type of violation at issue here was making, possessing, or transferring silencers without registering or paying the tax required by the NFA. While it is certainly possible to possess silencers for lawful purposes, no showing is made that they are a type of arm "in common use" covered by the Second Amendment. *See United States v. McCartney*, 357 F.App'x 73, 77, 2009 WL 4884336, *3 (9th Cir. 2009) ("Silencers, grenades, and directional mines are not 'typically possessed by law-abiding citizens for lawful purposes' … and are less common than either short-barreled shotguns or machine guns."); *United States v. Perkins*, 2008 WL 4372821, *4 (D. Neb. Sept. 23, 2008) ("silencers/suppressors 'are not in common use by law abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use'"); *United States v. Garnett*, 2008 WL 2796098, *4 (E.D. Mich. July 18, 2008) ("Nothing in [*Heller*] … casts doubt on the constitutionality of federal regulations over [machine guns] and silencers at issue in this case."). Because the foregoing arms are outside the scope of Second Amendment

protection, the application of the NFA to persons possessing, transferring or making such items does not infringe on Second Amendment rights.

Finally, defendant Cox's third type of conviction was for engaging in business as a dealer or manufacturer of silencers without paying the appropriate federal tax and registering. Defendant's motion does not address this charge specifically, but it is clearly one of the federal "laws imposing conditions and qualifications on the commercial sale of arms" that *Heller* said were permissible under the Second Amendment. Regardless of the level of scrutiny applied, a long-standing NFA regulation requiring a commercial firearms dealer to obtain a federal license and pay the federal tax required by the NFA before engaging in the firearms business would clearly pass muster under the Second Amendment. *See United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016) ("the prohibition against unlicensed firearm dealing is a longstanding condition or qualification on the commercial sale of arms and is thus facially constitutional"). In sum, binding Supreme Court precedent – i.e., *Sonzinsky, Miller, and Heller* - shows that the NFA, both on its face and as applied, is a valid and constitutional exercise of Congress's authority to levy taxes.[3]

[3] It bears pointing out how different the NFA is from the statute struck down in *Heller*. *Heller* involved a law *banning* an "entire class of 'arms' that [was] overwhelmingly chosen by American society" for the lawful purpose of self-defense, and it extended the ban "to the home, where the need for defense of self, family, and property is most acute." *Heller*, 128 S.Ct. at 2817. By contrast, the NFA deals with weapons or accessories not in common use, and it does not ban possession of those items, but only requires that a person register and pay a federal tax before possessing them.

IV. Congress's authority to regulate interstate commerce.

The U.S. Constitution also gives Congress the power "To regulate Commerce … among the several States…." U.S. Const., art. I, § 8. The Supreme Court has held that this clause does not permit Congress to regulate purely local activities. *See United States v. Lopez*, 514 U.S. 549 (1995). But Supreme Court case law also "firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Thus, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id*. [4]

The court's conclusion that the NFA is a valid exercise of Congress's taxing power makes it unnecessary to decide whether the NFA is also a valid exercise of Congress's power to regulate interstate commerce. *Cf. Montana Shooting Sports Ass'n. v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 955 (Jan. 13, 2014) (finding that under *Raich*, Congress can exercise its commerce power to validly regulate manufacture of firearms made within the State of Montana, notwithstanding Montana

[4] In *Raich*, the question was whether Congress could regulate a person's possession of medical marijuana in California when the marijuana was entirely locally grown and locally possessed, and was lawful to possess under California law. The Supreme Court found that "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, … and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 22. Thus, Congress "was acting well within its authority to 'make all Laws which shall be necessary and proper' [to] 'regulate Commerce … among the several States.'" *Id*. *See also id*. at 35 (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

Firearms Freedom Act declaring otherwise). Accordingly, the court does not address that issue.

V. Conclusion.

The Supreme Court cases cited above establish that the NFA provisions under which defendants were convicted are valid and constitutional acts adopted by Congress pursuant to its authority to levy and enforce the collection of taxes. As such, they constitute the "the supreme Law of the Land," notwithstanding "any Thing in the … Laws of any State to the Contrary." U.S. Const., art. VI.

IT IS THEREFORE ORDERED this 31st day of January, 2017, that the defendants' motion to dismiss (Dkt. 63) is DENIED.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 6:15-cr-10150-JTM

SHANE COX, and
JEREMY KETTLER,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the State of Kansas's Motion to Intervene (Dkt. 56). The motion is made pursuant to 28 U.S.C. § 2403(b), which provides a right of intervention for a State in certain circumstances when "the constitutionality of any statute of that State affecting the public interest is drawn in question…." The grants the motion to intervene, with the following clarification.

To date this court has not been called upon, and has not ruled upon, the constitutionality of the Kansas Second Amendment Protection Act (SAPA), K.S.A. § 50-1201 et seq. On May 10, 2016, the court denied a motion to dismiss the indictment, rejecting the defendant's argument that the National Firearms Act, 26 U.S.C. § 5801 et seq., was unconstitutional. The court found the NFA is valid exercise of Congress's taxing power. Dkt. 34 at 8. That finding meant the court did not need to address the defendant's additional argument that the NFA exceeded Congress's power to regulate interstate commerce. *Id*. The court also determined that the defendant could not rely

upon SAPA as the basis for an entrapment by estoppel defense, because such a defense requires a showing of reliance on a government official with responsibility for administering the law defining the offense – i.e., a federal official. *Id*. at 9. Finally, the court noted that an offense under § 5861(d) of the NFA does not require proof that a person possessing an unregistered silencer knew that such possession was prohibited by the NFA. *Id*. at 10.

On October 26, 2016, the court orally granted a Government motion in limine asking the court to find that "any defense based on [SAPA] is not a valid legal defense." Dkt. 39 at 1. As the court noted in a Memorandum and Order filed November 7, 2016, that oral ruling was subject to defendant making a further proffer of evidence. Dkt. 57. Upon reviewing the defendant's proffer, the court reiterated its prior legal rulings, but clarified that it would not prohibit all mention of SAPA at trial, but would instead instruct the jury on the proper consideration of any such evidence.

The court's ruling on the motion in limine was, by definition, a determination of what evidence would be relevant and admissible at trial, not a ruling on the constitutionality of SAPA.

Because § 2403(b) broadly allows intervention whenever the constitutionality of a state statute is "drawn into question," the court will grant the State's motion to intervene to allow it to be heard on any subsequent rulings that implicate the constitutionality of SAPA. At this point the State will not be participating directly in the criminal trial or presenting evidence, but it may submit a brief on any issue raised at trial that requires a ruling on the constitutionality of SAPA.

IT IS THEREFORE ORDERED this 8th day of November, 2016, that the State of Kansas's Motion to Intervene (Dkt. 56) is GRANTED.

s/ J. Thomas Marten
J. THOMAS MARTEN, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. 6:15-cr-10150-JTM-01,02

SHANE COX, and
JEREMY KETTLER,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on a motion to dismiss the indictment by defendant Shane Cox (Dkt. 29), and a motion to dismiss counts 5 and 13 by defendant Jeremy Kettler (Dkt. 32). For the reasons set forth herein, the court finds that the motions should be denied.

I. Summary

A first superseding indictment filed March 9, 2016, contains thirteen counts. Dkt. 27. Shane Cox, who is named in all but two counts, is charged with three counts of unlawful possession of an unregistered firearm (26 U.S.C. § 5861(d)), one count of conspiracy (18 U.S.C. § 371), five counts of unlawful transfer of an unregistered firearm (26 U.S.C. § 5861(e)), one count of unlawfully making a firearm in violation of the National Firearms Act (26 U.S.C. § 5861(f)), and one count of unlawfully engaging in business as a dealer and manufacturer of firearms (26 U.S.C. § 5861(a)). Jeremy Kettler is charged in three counts: one count each of making false statements on a matter within

the jurisdiction of the executive branch of the U.S. Government (18 U.S.C. § 1001), conspiracy (18 U.S.C. § 371), and unlawful possession of an unregistered firearm (26 U.S.C. § 5861(d)).

The "firearms" identified in the foregoing counts include silencers, destructive devices, and a short-barreled rifle. *See* 26 U.S.C. § 5845(a) (defining "firearm" under the National Firearms Act (NFA) to include the foregoing devices). The NFA generally requires individuals who make or transfer these types of firearms to register them and to pay a special tax. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). Section 5861 of the Act makes it unlawful to possess, make, receive, or transfer a firearm covered by the Act without having registered or paid the tax required by the Act.

In his motion to dismiss, defendant Cox argues that 26 U.S.C. § 5861 is unconstitutional because it is an invalid exercise of Congress' power to tax: "Congress has used the power to tax as a subterfuge to regulate the possession of certain weapons, and to punish severely the possession of those weapons not brought within the federal regulation scheme, thus the statute is unconstitutional." Dkt. 29 at 5. Defendant claims that "[o]n its face, and as applied, the statute … is much more than a taxing measure," because the NFA "gives the government the discretion to decide who can register a firearm, prohibits the registration of weapons the government determines may not be legally made, transferred, or possessed, and then criminally punishes the failure to register the weapon." *Id.* at 11. Defendant claims this is unconstitutional "because it goes beyond the power to tax." *Id.*

Cox additionally argues that 26 U.S.C. § 5861(d) is not valid under Congress' power to regulate interstate commerce. Dkt. 29 at 13. Defendant argues that criminalizing the intrastate possession of a firearm does not implicate any of the three areas of interstate commerce that Congress may properly regulate – i.e., the channels of interstate commerce; the instrumentalities of interstate commerce (including persons and things in interstate commerce); and activities that substantially affect interstate commerce. *Id*. at 15-18 (*citing, inter alia, United States v. Lopez*, 514 U.S. 549 (1995) (prohibition on possession of a firearm in a school zone exceeded Congress' authority to regulate interstate commerce)).[1]

Defendant Jeremy Kettler moves to dismiss Counts 5 and 13 on grounds of entrapment by estoppel. Kettler contends that he relied in good faith on the Kansas Second Amendment Protection Act, which declares in part that any firearm or "firearm accessory," including a silencer, which is made in Kansas and which remains in Kansas, "is not subject to any federal law … under the authority of congress to regulate interstate commerce." *See* K.S.A. § 50-1204. Kettler argues that 26 U.S.C. § 5861 "require[s] knowledge that someone is possessing a 'firearm' in violation of the federal prohibition in order to be found guilty," and that he "could not have known that any attribute of the 'firearm' brought it within federal regulation because the Kansas

[1] Cox opened and closed his brief with assertions that he did not intend to violate the law. *See* Dkt. 29 at 2 ("Cox relied on his State of Kansas representatives and did not believe he was violating the law") and at 25 ("defendant had reason to believe in and rely on the law of Kansas"). These assertions about Cox's subjective intent are not otherwise argued in the briefs. To the extent Cox is arguing that he did not have the intent necessary to commit the offense, that is a question for the jury to decide based upon the evidence and the instructions given at trial. To the extent Cox is raising a defense of entrapment by estoppel, that argument is rejected for the same reasons set forth herein pertaining to defendant Kettler.

legislature … explicitly told the citizens of the State of Kansas that a sound suppressor did not fall within federal regulation." Dkt. 32 at 4. Kettler argues that this amounts to a defense of entrapment by estoppel, which can arise from a person's reasonable reliance upon the misleading representations of a government agent. *Id*. at 4 (*citing United States v. Hardridge*, 379 F.3d 1188 (10th Cir. 2004)).

II. Discussion

A. Whether 26 U.S.C. § 5861 is a valid exercise of Congress' taxing authority. The National Firearms Act imposes strict regulatory requirements on certain statutorily defined "firearms." *Staples v. United States*, 511 U.S. 600, 602 (1994). Under the Act, the term "firearm" includes, among other things, a rifle having a barrel of less than 16 inches in length, a silencer, and a destructive device. 26 U.S.C. § 5845(a). Under the Act, all such firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. § 5841. Section 5861(d) makes it a federal crime, punishable by up to 10 years in prison, for any person to possess a firearm that is not properly registered. *Staples*, 511 U.S. at 602-03.

Among other things, the Act imposes a tax upon dealers in these firearms (§ 5801); requires registration of dealers (§ 5802); imposes a tax of $200 per firearm on the maker of the firearm (§ 5821); imposes a $200 tax on each firearm transferred, with the tax to be paid by the transferor (§ 5811); and prohibits transfers unless a number of conditions are met, including that the transferor must file an application with the Secretary, the transferor must pay the required tax and identify the transferee and the firearm, and the Secretary must approve the transfer (§ 5812).

As Cox concedes, the Supreme Court long ago rejected the argument that the Act was not a valid exercise of Congress' authority to levy taxes because it was allegedly designed as a penalty to suppress trafficking in certain firearms. *See Sonzinsky v. United States*, 300 U.S. 506, 512-14 (1937) ("a tax is not any the less a tax because it has a regulatory effect"). Since then, the Tenth Circuit, like all other circuits to address the issue, has found that § 5861 represents a valid exercise of Congress' taxing authority. *See United States v. Houston*, 103 F. Appx. 346, 349-50, 2004 WL 1465776 (10th Cir. 2004) ("Mr. Houston fails to establish 26 U.S.C. § 5861(d) and its parent act are beyond Congress' enumerated power to either regulate commerce through firearms registration requirements, or impose a tax thereon."); *United States v. Roots*, 124 F.3d 218 (Table), 1997 WL 465199 (10th Cir. 1997) ("*Lopez* does not undermine the constitutionality of § 5861(d) because that provision was promulgated pursuant to Congress's power to tax"). *See also United States v. Village Center*, 452 F.3d 949, 950 (8th Cir. 2006) ("irrespective of whether § 5861(c) is a valid exercise of Congress's commerce clause authority … it is a valid exercise of Congress's taxing authority"); *United States v. Lim*, 444 F.3d 910, 914 (7th Cir. 2006) ("Section 5861(d), as applied to Lim's possession of the sawed-off shotgun, is a valid use of Congress's taxing power"); *United States v. Pellicano*, 135 F. Appx. 44, 2005 WL 1368077 (9th Cir. 2005) (valid exercise of taxing power); *United States v. Oliver*, 208 F.2d 211 Table), 2000 WL 263954 (4th Cir. 2000) (the weapon need not have traveled in interstate commerce because § 5861 "has been held to be a valid exercise of the power of Congress to tax"); *United States v. Gresham*, 118 F.3d 258, 261-62 (5th Cir. 1997) ("Gresham charges that Congress has used the taxing power as a pretext

to prohibit the possession of certain disfavored weapons, without any rational relationship to the revenue-raising purposes of the Internal Revenue Code. … To the contrary, it is well-settled that § 5861(d) is constitutional because it is 'part of the web of regulation aiding enforcement of the transfer tax provision in § 5811.'"); *United States v. Dodge*, 61 F.3d 142, 145 (2nd Cir. 1995) (the registration requirement "bears a sufficient nexus to the overall taxing scheme of the NFA and, therefore, assists the government in collecting revenues.").

Defendant tries to get around these cases by relying on *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). In that case the Tenth Circuit held it was unconstitutional to convict a defendant for possessing an unregistered machine gun when there was a separate criminal ban on possession of machine guns. The ban made registration of such weapons a legal impossibility. In that circumstance, the Tenth Circuit found, the § 5861 could not reasonably be viewed as an aid to the collection of tax revenue. *See Dalton*, 960 F.2d at 125 ("a provision which is passed as an exercise of the taxing power no longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed."). But the Tenth Circuit soon made clear that *Dalton* applied only if there was a statutory ban on possession of the particular firearm. Thus, § 5861 was constitutionally applied to possession of a sawed-off shotgun, a weapon as to which there was no separate ban. *United States v. McCollom*, 12 F.3d 968 (10th Cir. 1993). *See also United States v. Berres*, 777 F.3d 1083 (10th Cir. 2015) (rejecting due process challenge to conviction for possession of unregistered flash-bang device). The *McCollom* rule applies equally to the firearms identified in the indictment in this case – silencers,

short-barreled rifles, and destructive devices – because it was legally possible to register and pay the required tax on such items. *Berres*, 777 F.3d at 1088; *McCollom*, 12 F.3d at 971 ("[d]ifferent from *Dalton*, the registration of this weapon was not a legal impossibility."); *United States v. Eaton*, 260 F.3d 1232, 1236 (10th Cir. 2001) (defendant's conviction for possessing unregistered pipe bombs did not violate due process; there was no statute criminalizing possession of pipe bombs and defendant was not precluded by law from registering them).

Finally, Cox contends that because the government retains some authority to deny an application for registration of a firearm, that fact somehow renders the Act unconstitutional. Dkt. 29 at 8-9. As an initial matter, the court notes defendant has not alleged that an application for registration of these particular firearms was in fact denied. Moreover, the Tenth Circuit has made clear that it is only when registration is a legal impossibility that application of § 5861 constitutes a due process violation. *See McCollom,* 12 F.3d at 971 ("Even if it is unlikely that the firearm would have been accepted for registration, the defendant has cited no statute which makes the possession of short-barreled shotguns illegal."); *Eaton*, 260 F.3d at 1236 ("[w]hether the ATF would have accepted the pipe bomb for registration does not bear on the issue of legal impossibility."). *See also United States v. Shepardson*, 167 F.3d 120, 123 (2nd Cir. 1999) (same); *United States v. Aiken*, 974 F.2d 446, 449 (4th Cir. 1992) ("The fact that not everyone might be able to obtain a short-barreled shotgun, since the BATF must first approve the reasonable necessity and public safety declarations, does not invalidate the NFA as a taxing statute."). *See also Dist. of Columbia v. Heller*, 554 U.S. 570, 624 (2008)

("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

Defendant has not alleged or made any showing that registration of the firearms identified in the indictment was a legal impossibility. Under these circumstances, Tenth Circuit law compels a finding that application of § 5861(d) rationally furthers the NFA scheme for collecting taxes and constitutes a valid exercise of Congress' taxing authority. *McCollom, supra. See also* U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes"); *Sonzinsky*, 300 U.S. at 514 ("an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."). Accordingly, defendant Cox's motion to dismiss the indictment must be denied. In view of this finding, the court need not address Cox's additional argument that § 5861 exceeds Congress' power to regulate interstate commerce.

B. Entrapment by estoppel. "The defense of entrapment by estoppel is implicated where an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation so that criminal prosecution of the actor implicates due process concerns under the Fifth and Fourteenth Amendments." *United States v. Bradley*, 589 F. App'x 891, 896 (10th Cir. 2014) (*quoting United States v. Nichols,* 21 F.3d 1016, 1018 (10th Cir. 1994), *cert. denied*, 135 S. Ct. 1511, 191 L. Ed. 2d 445 (2015)).

To establish the defense, a defendant must show: (1) an active misleading by a government agent who is responsible for interpreting, administering, or enforcing the

law defining the offense; and (2) actual reliance by the defendant, which is reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation. *Bradley*, 589 F. Appx. at 896 (*citing United States v. Rampton*, 762 F.3d 1152, 1156 (10th Cir. 2014)).

Defendant Kettler's assertion of this defense fails to satisfy the first element. He contends he was misled by the State of Kansas (or its legislature), because it represented through adoption of K.S.A. § 50-1204 that possession of a silencer that was made in and remained in Kansas was not subject to any federal law.[2] But Kansas officials and representatives are not responsible for interpreting or enforcing the law defining this offense - 26 U.S.C. § 5861 - which is a federal statute adopted by Congress, interpreted by the courts of the United States, and enforced by the executive branch of the United States. Kansas officials have authority to declare the laws of Kansas, but they have no responsibility for construing or enforcing federal laws such as this. The defense of entrapment by estoppel is not available to defendant in these circumstances. *See Gutierrez-Gonzales*, 184 F.3d 1160, 1167 (10th Cir. 1999) ("the 'government agent' must be a government official or agency responsible for enforcing the law defining the offense"); *United States v. Stults*, 137 F. Appx. 179, 184, 2005 WL 1525266, *5 (10th Cir. 2005) (advice given by state probation and state judge was not the advice of a federal official and did not give rise to entrapment by estoppel); *United States v. Hardridge*, 379 F.3d 1188, 1195 (10th Cir. 2004) (Kansas City Police Department was not responsible for interpretation

[2] K.S.A. § 50-1204 declares that a firearm accessory which is made in Kansas and which remains in Kansas "is not subject to any federal law, … *under the authority of congress to regulate interstate commerce.*" [emphasis added]. The provision does not mention Congress' power to levy taxes.

or enforcement of federal firearms law). *See also United States v. Miles*, 748 F.3d 485, 489 (2nd Cir. 2014) (citing "unanimous" rule that state and local officials cannot bind the federal government to an erroneous interpretation of federal law).

Kettler nonetheless argues that the representation in this instance came from "a governing body of such character [as] to render reliance reasonable." Dkt. 32 at 6. But the above cases demonstrate that it is not reasonable to rely upon representations about the validity of federal law from officials who have no authority over federal law.

Kettler contends the *mens rea* for an offense under § 5861 could not possibly have been present. Dkt. 32 at 4. In so arguing, he mistakenly asserts that § 5861 requires proof that he knew possession of an unregistered silencer was a violation of the federal law. *Id*. But in *Staples v. United States*, 511 U.S. 600 (1994), where the defendant was charged with possession of an unregistered machine gun, the Court held only that the government must prove the defendant knew *of the characteristics of his weapon* that made it a firearm under the NFA, not that he knew the NFA required its registration. *See Staples*, 511 U.S. at 622, n.3 (Ginsburg, J., concurring) ("The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'"); *United States v. Michel*, 446 F.3d 1122, 1130 (10th Cir. 2006) ("Although the government was required to prove Mr. Michel knew the gun was a sawed-off shotgun, it was not required to further prove he knew it was supposed to be registered or that it lacked a serial number.").

As such, under § 5861 the government must prove the defendant knew that the device in question was "for silencing, muffling, or diminishing the report of a portable firearm," not that he knew possession of such an unregistered item violated the NFA. *See* 26 U.S.C. § 5845(a)(7) and 18 U.S.C. § 921(a)(24). Whether or not defendant had the requisite knowledge for commission of that offense is a question for the jury to determine from the evidence.

IT IS THEREFORE ORDERED this 10th day of May, 2016, that the defendants' motions to dismiss the indictment (Dkts. 29 and 32) are DENIED. Defendants' motions to join in each other's motions (Dkts. 30 and 31) are GRANTED.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE